



July 28, 2021

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2310A)  
Washington, DC 20460  
E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

**SUBMITTED VIA ONLINE SUBMISSION FORM**

**RE: Freedom of Information Act Request – Treated article exemption and neonicotinoid coated seeds**

To the U.S. Environmental Protection Agency (EPA) FOIA Officer:

The Center for Food Safety (CFS) is a 501(c)(3) nonprofit, public interest and environmental advocacy organization that works to address the adverse health and environmental impacts of our industrial food system, while at the same time advocating for a more sustainable future for our food. CFS has a long history of promoting sustainable farming practices and advocating and litigating for the ban of toxic pesticides. Consistent with this mission and pursuant to 40 C.F.R. Part 2 and the Freedom of Information Act, 5 U.S.C. § 552, CFS respectfully requests the following information:

**All records relating to crop seeds treated or coated with any of the following chemicals: acetamiprid, clothianidin, imidacloprid, or thiamethoxam (hereinafter, “neonicotinoids”), including but not limited to the subtopics specifically described below:**

- 1. Any and all documents or communications since Jan. 1, 2017, relating to EPA’s implementation or interpretation of the Treated Article Exemption, 40 C.F.R. § 152.25(a), with regard to its application to crop seeds treated or coated with neonicotinoids.**
- 2. Any and all documents or communications since Jan. 1, 2017, related to any determination that neonicotinoid-coated crop seeds are or are not subject to regulation as pesticides under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, (FIFRA).**
- 3. Any and all documents or communications since Jan. 1, 2017, related to any agency determination that neonicotinoid-coated crop seeds as a class or as a whole do or do not cause unreasonable adverse effects on the environment.**

**NATIONAL HEADQUARTERS**

660 Pennsylvania Avenue, SE, Suite 302  
Washington, D.C. 20003  
T: 202-547-9359 F: 202-547-9429

**CALIFORNIA OFFICE**

303 Sacramento Street, 2nd Floor  
San Francisco, CA 94111  
T: 415-826-2770 F: 415-826-0507

**PACIFIC NORTHWEST OFFICE**

917 SW Oak Street, Suite 300  
Portland, OR 97205  
T: 971-271-7372 F: 971-271-7374

**HAWAII OFFICE**

1132 Bishop Street, Suite 2107  
Honolulu, Hawaii 96813  
T: 808-681-7688

[office@centerforfoodsafety.org](mailto:office@centerforfoodsafety.org)

[centerforfoodsafety.org](http://centerforfoodsafety.org)

4. **Any and all communications since Jan. 1, 2017, with any pesticide registrant, applicant for registration, or potential applicant for registration, or with any other persons or entities regarding the application or scope of the Treated Article Exemption with respect to neonicotinoid-coated crop seeds.**
5. **Any and all documents related to, or communications with, any federal, state or tribal pesticide regulators regarding inspections or investigation of incidents involving treated seeds, particularly neonicotinoid treated seeds, and reported bee kills incidents that have occurred since Jan. 1, 2017.**

**“All records” includes but is not limited to all correspondence, minutes, memoranda, communications, e-mails, reports, maps, plans, drawings, databases, phone notes and/or any other documents whatsoever created by, received from, or given to the agency, companies, or other regulators. This request includes all records that have ever been within your custody or control, whether produced by you or by others, and includes all current and former working, investigative, retired, electronic, and/or other files.**

This request is being sent to the EPA FOIA Officer with the understanding that it will be forwarded to other officers, offices, or departments with information pertinent to this request.

### **REQUEST FOR FEE-WAIVER**

CFS requests that pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l)(2)(i), EPA waive all fees in connection with the procurement of this information. As demonstrated below, the nature of this request meets the test for fee waiver as expressed in the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l)(2)(i).

In determining whether the fee waiver criteria are satisfied, CFS respectfully reminds the EPA that FOIA is inclined toward disclosure and that the fee waiver amendments were enacted to allow further disclosure to nonprofit, public interest organizations. *See* 132 Cong. Rec. S. 14270-01, (statement of Sen. Leahy) (“[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information.”). Furthermore, the Ninth Circuit Court of Appeals has interpreted this fee waiver section broadly, holding that the section “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy).

The factors EPA must consider in deciding upon a fee waiver request are laid out in 40 C.F.R. § 2.107(l)(2), and those relating to a significant contribution to public understanding of the operations or activities of the government can be summarized as follows:

- (1) Whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of the Agency.

- (2) Whether the contents of the records to be disclosed have an informative value.
- (3) Whether the disclosure of the information will likely contribute to an understanding of the subject by the general public.
- (4) Whether the contribution to public understanding is significant.

40 C.F.R. § 2.107(l)(2)(i).

**I. The Present Disclosure is in the Public Interest Because it Will Significantly Contribute to Public Understanding of the Operations or Activities of Government.**

The requested disclosure will contribute to public understanding of the operations or activities of the government. 5 U.S.C. § 552(a)(4)(A)(iii).

**A. The subject of the disclosure concerns “the operations and activities of the government.”**

The requested information pertains to EPA’s regulation of pesticides under FIFRA and specifically its regulation of neonicotinoid-coated seeds and the application of the “treated article” exemption to those seeds. Because EPA is responsible for regulating insecticides, this request regarding information about the Agency’s application of an exemption from regulation to neonicotinoid-coated crop seeds relates to operations and activities of the government. This disclosure will demonstrate to the public at large how EPA regulates insecticides, in particular neonicotinoid-coated seeds, how and why it exempts certain pesticides from registration, how it communicates these policies with the public and regulated community, and how it works with state and tribal regulators on the issue of neonicotinoid-coated seeds and bee kills, which directly relates to the operations and activities of the government.

**B. The disclosure is “likely to contribute significantly to public understanding” of government operations and activities.**

As discussed in the previous section, the present disclosure will provide the public a better understanding of how EPA analyzes the use and potential harm of insecticides, in particular neonicotinoids used to coat seeds, in fulfillment of its regulatory duties, including communications it has with interested parties and other regulators during that process. More specifically, the present disclosure will provide the public with an understanding of how EPA analyzes the character and potential adverse impacts from a certain class of insecticides (seeds coated in neonicotinoids), how EPA applies and enforces its exemption from regulation for “treated articles,” and how EPA communicates that exemption and its scope to the regulated entities who manufacture the insecticide products. It is essential for members of the public, including consumers, farmers, beekeepers, and other public interest organizations, to better understand how EPA interprets and applies its exemptions from FIFRA requirements for “treated

articles” and its understanding of the potential impacts from seeds coated with neonicotinoids. The requested records will meaningfully inform the public about these government operations or activities in a way not currently available in the public domain. *See* 40 C.F.R. § 2.107(l)(2)(ii).

Simultaneously, disclosure of the requested information will aid CFS in fulfilling its function of public oversight of government action. Public oversight of agency action is a vital component in our democratic system and is the bedrock upon which FOIA stands.

**C. CFS is highly qualified to analyze the requested information, and also aptly positioned to disseminate it to the public.**

CFS is a tax-exempt, non-profit organization with offices in San Francisco, California; Portland, Oregon; and Washington, D.C. CFS represents more than 975,000 farmer and consumer members, in every state throughout the country. Since its inception in 1997, CFS’s mission has been to empower people, support farmers, and protect the environment from the harmful impacts of industrial agriculture. Every day CFS staff works to address the adverse health and environmental impacts of our industrial food system, while at the same time advocating for a more sustainable future for our food. When we think of “food safety,” we mean it in a broad sense: food that is safe for people, but also safe for the planet and workers. Accordingly, CFS’s program activities cover the gamut of all aspects of the food and agriculture system, including but not limited to: foodborne illness; truth in food labeling; ocean aquaculture and fisheries issue; livestock pollution; soil protection; industrial monocultures; new and emerging food technologies; and many more.

A cornerstone of this mission is to advocate for thorough, science-based safety assessments of agricultural products and technologies. As part of its broader mission one of CFS’s flagship programs has always been addressing the adverse environmental, health, and socioeconomic impacts of pesticides. CFS has multiple staff—scientific, policy, and legal—that work on this program. Due to the nature of CFS’s organizational activities, it frequently employs FOIA’s provisions in record requests to EPA to monitor EPA’s decision-making with regards to its regulatory authority over pesticide use under FIFRA, and to open the operations and activities of EPA to public scrutiny and contribute significantly to the public’s understanding of the agency’s actions as it relates to pesticides. Consequently, CFS is highly qualified to fully comprehend, analyze, and organize the requested records.

In addition, CFS combines multiple tools and strategies in pursuing its mission, including public and policymaker education, outreach, and campaigning. CFS disseminates a wide array of informational materials to government agencies, lawmakers, nonprofits, and the general public regarding the effects of industrial food production, agricultural products, and pesticides, on human health and the environment. These educational and informational materials include, but are not limited to, news articles, policy reports, white papers, legal briefs, press releases, newsletters, product guides, action alerts, fact sheets, and our website. For example, CFS has

authored several reports and fact sheets regarding neonicotinoids.<sup>1</sup> CFS often has provided expert testimony to policymakers on the issues including the adverse impacts and risks of pesticides. Staff members regularly monitor the Federal Register and submit comments to EPA and other regulatory agencies via the public notice-and-comment process. CFS also regularly sends out action alerts to its members, encouraging them to participate in the notice-and-comment process, or to submit letters to government officials related to the oversight of industrial agriculture, pesticide use, genetically engineered crops, and other issues affecting CFS's mission to build a sustainable food system. For example, in 2014 CFS delivered to EPA a petition with over half a million signatures urging EPA to follow the European Union's lead in recognizing the risk of neonicotinoid pesticides.<sup>2</sup> When necessary, CFS also engages in public interest litigation to address the impacts of industrial food production and pesticides on its members, the environment, and the public interest. Accordingly, CFS is an effective vehicle to disseminate information to the general public about pesticides and herbicides, and specifically on EPA's regulation of crop seeds coated with neonicotinoids and their impact on human health, animal health, and the environment.

Federal courts have found that dissemination to 2,500 people through a newsletter and the intent to start a website is sufficient to meet the "reasonably broad audience" factor. *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005). Moreover, they have found that the proven ability to digest and disseminate highly technical information, as demonstrated by past analysis and dissemination, merits giving nonprofit organizations fee waivers. *See W. Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004). CFS's activity in these respects far outstrips any minimums established by judicial interpretation.

## **II. Obtaining the Information is of No Commercial Interest to CFS.**

The Center for Food Safety is a 501(c)(3) non-profit environmental advocacy organization that works to address the impacts of our industrial food production system on human health, animal welfare and the environment. CFS works to achieve its goals through grassroots campaigns, public education, media outreach, and litigation. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See e.g.*, OMB Fee Guidelines, 52 Fed. Reg. 10017-18. Such interests

---

<sup>1</sup> Center for Food Safety, *Neonicotinoid Study Index*, <http://www.centerforfoodsafety.org/issues/304/pollinators-and-pesticides/fact-sheets/3683/neonicotinoid-study-index>; Center for Food Safety, *Pollinators & Pesticides* Fact Sheet Aug. 2016, [http://www.centerforfoodsafety.org/files/pollinatorspesticides-2016\\_fact-sheet\\_82548.pdf](http://www.centerforfoodsafety.org/files/pollinatorspesticides-2016_fact-sheet_82548.pdf); Center for Food Safety, *Water Hazard: Aquatic Contamination by Neonicotinoid Insecticides in the United States* (Sept. 16, 2015), <http://www.centerforfoodsafety.org/issues/304/pollinators-and-pesticides/reports/4048/water-hazard-aquatic-contamination-by-neonicotinoid-insecticides-in-the-united-states>; Center for Food Safety, *Hidden Costs of Toxic Seed Coatings*, Fact Sheet June 2015, [http://www.centerforfoodsafety.org/files/neonic-factsheet\\_75083.pdf](http://www.centerforfoodsafety.org/files/neonic-factsheet_75083.pdf); Center for Food Safety, *Heavy Costs: Weighing the Value of Neonicotinoid Insecticides in Agriculture* (March 24th, 2014), <http://www.centerforfoodsafety.org/issues/304/pollinators-and-pesticides/reports/2999/heavy-costs-weighing-the-value-of-neonicotinoid-insecticides-in-agriculture>.

<sup>2</sup> *See* Press Release, Center for Food Safety, Half a Million Demand Action from EPA to Save Bees (Mar. 20, 2014), <https://centerforfoodsafety.org/issues/304/pollinators-and-pesticides/press-releases/2995/half-a-million-demand-action-from-epa-to-save-bees>.

are not present in this request. In no manner does CFS seek information from EPA for commercial gain or interest. CFS respectfully files this FOIA request pursuant to its goal of educating the general public on the adverse effects of industrial agriculture. Upon request and free of charge, CFS will provide members of the public with relevant information obtained from EPA, and as stated previously, CFS is in a position to digest the information and present it in a format understandable to the layperson.

Based upon the foregoing, CFS requests that this FOIA be classified within the EPA's fee waiver category and that EPA send the requested information as required by law.

### **RESPONDING TO THE REQUEST**

As this is a matter of extreme importance to CFS, we look forward to your reply within twenty working days as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). If the responsive records are voluminous please contact me to discuss the proper scope and timing of the response. If any exemption from FOIA's disclosure requirement is claimed, please describe in writing, for each individual document, the general nature of the document, all information necessary to substantiate the claimed exemption, and the particular legal basis upon which the exemption is claimed. Should any document be redacted, please indicate the location of the redaction using black ink. Please provide any and all non-exempt portions of any document which may be partially exempt due to some privilege as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

Please send all materials to [jloda@centerforfoodsafety.org](mailto:jloda@centerforfoodsafety.org). Electronic materials are preferred, but if records must be mailed, please send to 303 Sacramento Street, 2nd Floor, San Francisco, CA 94111. Please email me at [jloda@centerforfoodsafety.org](mailto:jloda@centerforfoodsafety.org) or call me at 415-826-2770 or 515-441-1636 if you have any further questions about this request. Thank you for your attention to this request.

Sincerely,



Jennifer Loda  
Staff Attorney  
Center for Food Safety  
303 Sacramento St, 2<sup>nd</sup> Floor  
San Francisco, California 94111  
[jloda@centerforfoodsafety.org](mailto:jloda@centerforfoodsafety.org)